In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 485

STELLA C. DAVIS, PETITIONER

v.

JOHN EDGAR HOOVER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The gravamen of petitioner's complaint (which was dismissed below) is unclear. Apparently, petitioner charges respondent Foreman, a former Assistant United States Attorney, with having conspired with certain other persons to defraud petitioner and with having failed to institute criminal proceedings against the National Bank of Mattoon, Illinois The complaint, as it relates to respondent Hoover and unnamed agents of the Federal Bureau of Investiga-

tion, complains of inaction on their part in failing to respond to petitioner's requests for assistance. Presumably, petitioner's claim against the United States is predicated on the Federal Tort Claims Act, 28 U.S.C. 1346(b).

The district court dismissed the complaint on the grounds of lack of jurisdiction and for failure to state a claim upon which relief could be granted. The court of appeals affirmed (Pet. p. 13). That disposition, we submit, was clearly appropriate.

An action against respondent Foreman complaining of acts (presumably libel) committed by him while discharging his official responsibilities as an Assistant United States Attorney is precluded by *Barr* v. *Matteo*, 360 U.S. 564. The allegation that the acts were part of a conspiracy is not, of course, sufficient to place the claim beyond the ambit of the official immunity doctrine. *Brictson* v. *Woodrough*, 164 F. 2d 107 (C.A. 8). See *Bradley* v. *Fisher*, 13 Wall. 335, 347-348, 351. Furthermore, no action will lie to require a United States Attorney, or one of his subordinates, to institute a criminal proceeding. *United States* v. *Cox*, 342 F. 2d 167 (C.A. 5), certiorari denied *sub. nom. Cox* v. *Hauberg*, 381 U.S. 935.

In any event, petitioner has previously litigated this matter. *Davis, et al.* v. *Foreman, et al.*, 239 F. 2d 579 (C.A. 7), certiorari denied, 353 U.S. 930. *Res judicata* is thus an additional bar to the instant suit.

Insofar as the action is directed against Director Hoover and unnamed agents of the Federal Bureau

of Investigation, petitioner does not seek judgment; she seeks the Bureau's assistance in establishing the fact that she telephoned the Bureau's Springfield, Illinois, office some time in 1950 [1] and asked "protection" from reprisals (Pet. p. 4). Plainly no cause of action is stated.

Finally, apart from the question whether the complaint alleges facts which would conceivably entitle petitioner to relief against the United States under the Tort Claims Act, the complaint is plainly time-barred; the acts complained of were committed in 1950 and 1951, more than 12 years before this action was commenced (A. pp. 11-17).[2] 28 U.S.C. 2401(b) requires that suit be filed within two years after the claim accrues. Moreover, this claim too is barred by *res judicata*. *Davis et al.* v. *Foreman, et al., supra.*[3]

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[1] Petitioner apparently deems it essential that she establish that fact in order to establish various claims she has asserted against diverse persons. For a summary of petitioner's prior litigation see p. 8 of the petition.

[2] "A." references are to the appendix to petitioner's brief in the court of appeals which has been filed as part of the record in this Court.

[3] Petitioner challenges 28 U.S.C. 1654 which guarantees the right to appear in all United States courts either *pro se* or by counsel authorized to practice before the particular court. The record reflects that petitioner was permitted personally to participate during all phases of this litigation and there is no suggestion that her right to counsel was in any way infringed.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

SEPTEMBER 1965.

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